

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

STARCREST PRODUCTS OF
CALIFORNIA, INC.
3600 Brennan Avenue
Perris, CA 92571

Employer

Docket No. 02-R3D1-1385

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Starcrest Products of California, Inc. (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On January 31, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted a complaint inspection at a place of employment maintained by Employer at 3660 Brennan Avenue, Perris, California (the safe).

On March 8, 2002, the Division issued a citation to Employer alleging a general violation of section 3272(b) [aisle width] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹ with a proposed civil penalty of \$300.

On June 13, 2003, a hearing was held before Dale A. Raymond, Administrative Law Judge (ALJ), in Anaheim, California. Richard W. Kopenhefer, Attorney of McDermott, Will & Emery, represented Employer. Raymond L. Towne, Staff Counsel represented the Division. On September 8, 2003 the ALJ issued a decision denying Employer's appeal.

On October 9, 2003, Employer filed a petition for reconsideration. The Division filed an answer on November 13, 2003. The Board took Employer's petition under submission on November 21, 2003.

¹ Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

SUMMARY OF EVIDENCE

Associate Cal/OSHA Engineer Jag Dhillon (Dhillon) testified for the Division. He inspected the site on January 31, 2002, accompanied by Service Manager Bill Guthrie (Guthrie) and Human Resources Manager Cassandra Weeks (Weeks). Dhillon observed seven rows of stacked boxes in the warehouse. The spaces in between the rows were approximately 16 inches. Dhillon testified that he observed employees accessing the spaces between the boxes to retrieve merchandise. He took three photographs collectively marked as Exhibit 2. Two of the photographs show an employee next to the boxes. An employee is between the ends of two rows in one of the photographs. Dhillon interviewed three employees, Consolidator Stephani Small, Stocker John Fanning and Stocker Jesus Peyan. Based upon the above, Dhillon issued Citation 1, Item 1 for a general violation of section 3272(b).

Service Manager Bill Guthrie testified for Employer. He testified in detail regarding the layout of the stock, noting that Dhillon's description and diagram (Exhibit A²) of Employer's operations was incorrect. There are six rows of boxes. The space between the rows is 16 inches, except for the middle, where there is a four foot wide aisle. The rows lead up to a flow rack which sits between the end of the boxes and the conveyor belt. Flow racks are freestanding metal shelving. There are four foot wide aisles surrounding the six rows of boxes. Guthrie drew in red on Exhibit A to show corrections to Dhillon's diagram.

Guthrie denied that employees use the rows between the boxes as aisles or walkways, except for the four-foot middle aisle. The rows are a maximum of six feet long. An employee might step into the spaces between the rows of boxes to see a label at most. Boxes of merchandise are generally 24, 36 or more inches on an end. It is impossible to carry a box of that size down a 16 inch row. Employees access the boxes from the ends of the rows. If an employee needs to access a box in the middle of a row, the employee must break down the row from the end. The spaces between the boxes exist to organize the stock, line up the appropriate stock with the proper positions on the flow rack, and provide space for visual verification of the stock.

Employees working the conveyor belt are called "Pickers." Each Picker works from a five foot wide section of the flow rack. Tote boxes pass by the Pickers on the conveyor belt at 75 feet per minute. Pickers have up to 25 different products they may need to select from the flow rack and place in the tote as it goes by. Guthrie testified that this task can only be accomplished if the product is available within a width of about five feet on the flow rack.

² Dhillon drew Exhibit A during Employer's deposition of him.

Employees who work with the rows of boxes and replenish the flow racks are called “Stockers.” Each Stocker is responsible for one five foot section of the flow rack corresponding to one Picker. In order to permit the Stockers to control the flow of merchandise into their section of the flow rack, each Stocker has one row of boxes containing his or her product. Guthrie testified that if Employer separated the rows by 24 inches, the rows would no longer be lined up in front of the proper sections of the flow rack. As a result, Stockers would have to cross each others’ path, creating a hazard. As things stood, the work atmosphere was frantic, especially when “stock out” emergencies occurred.

Photographs of Employer’s operations were admitted as Exhibits B through I. The photos were taken after the day of the inspection, but Employer’s operations were substantially the same.

Employer introduced the testimony of Brian Kleiner, Ph.D., (Kleiner) as an expert on workplace safety and English grammar, having taught it at the college level. He is not an attorney. He testified regarding the meaning of “aisle or walkway.” He gave the opinion that section 3272(b) was intended to apply to high volume passageways, indicated by the inclusion of the concepts of “required” and “egress” in the safety order. He further opined that the four-foot wide aisles which surrounded the rows and which ran through the middle were the “required” aisles for egress.

ISSUES

Did the Division establish a violation of section 3272(b)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer petitioned for reconsideration of the Decision of the ALJ denying its appeal alleging:

1. The Division introduced no evidence showing that the spaces are ‘required’ aisles or walkways within the meaning of Section 3272(b) as understood by the Standards Board and under Board precedent.
2. The spaces between the rows of boxes in Starcrest’s warehouse are not ‘aisles or walkways’ within the meaning of Section 3272(b) and;
3. There exists no technically feasible method for enlarging the spaces between the boxes in the manner the Division seeks to require.

The Board disagrees with Employer’s factual and legal arguments in this case and finds that Employer’s appeal was properly denied.

Section 3272(b) provides that:

Where aisles or walkways are required, machinery equipment, parts, and stock shall be so arranged and spaced as to provide clear walkways or aisles of not less than 24 inches in width and 6 feet 8 inches clear headroom to a safe means of egress from the building.

The parties agreed that the spaces in between the rows of stacked boxes were less than 24 inches wide³. Employer took the position that these spaces were organizational delineators. Employer's position is that they were not aisles or walkways within the meaning of section 3272(b) because they were not required for egress from the building and because they were not used for passage.

Under the coverage language of the section, the safety order is applicable "[w]here aisles or walkways are required." Board precedent has long held that section 3272(b) is not limited to walkways used as a means of egress from a building and that "[t]he safety order requirements pertain to all walkways or aisles so that unobstructed egress from a building can be effected." *Kaiser Steel Corporation, Steel Manufacturing Division*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982)). The Board believes that the language of the regulation refers to a functional requirement, employer practice or work area necessity that requires an employer to leave enough space to access a safe means of egress from the building when the employee is in an area that can be classified as an aisle or a walkway amongst the machinery, equipment parts or stock referred to in section 3272(b).

It is apparent from the language in the section that, where aisles or walkways are required, the objective of the safety order is "to provide clear walkways or aisles ... to a safe means of egress from the building" that are no less than the stated measurements. Under this language, clear passageways must be provided in buildings from areas where an employee performs his or her work to an area of the building where employees can safely exit. This interpretation furthers the protective purposes of the Act insofar as employees are provided a safe and clear passage from their workplaces which allows a safe exit from a building. (See *Carmona v. Division of Industrial Safety*, (1975) 13 Cal3d 303.)

Employer's argument that the spaces are not aisles or walkways because employees do not use them as passageways is unpersuasive. The amount of usage is not determinative as to whether or not the space is a hallway, walkway or passageway. The fact that it may or may not be commonly used as a passageway is not determinative. The public policy underlying the regulation

³ The distance between the striped tape (Hearing Exhibits B, D, E, F and G) was 16 inches.

sets forth a minimum standard for persons who may use the aisle or walkway to pass through unimpeded if the aisle or passageway is used. A further public policy is to allow unimpeded access to a safe means of egress from a building in cases of emergency.

The Board determines that the spaces in question here were used as aisles and walkways based on the testimony of Dhillon. He testified that he saw employees retrieving boxes from the area around the spaces. That testimony was not refuted. Dhillon's testimony was corroborated by other evidence. Guthrie's testimony that employees might step or did step into the spaces to look at labels corroborates Dhillon's testimony. According to Guthrie, the spaces were up to six feet long. Looking for a box in the middle of the row would require an employee to enter the space between rows of boxes. No physical barrier prevented an employee from using the spaces between the boxes as walkways. Employer did not present any evidence that employees were told not to use the spaces as walkways. The evidence in this case is sufficient to support a finding that employees used the spaces as walkways or passage areas to access the boxes in the middle of the rows. In addition, the Board notes that Exhibit 2 shows a hand cart in the middle of one of the "aisles or walkways" in question. The most logical inference to be drawn from looking at that exhibit is that the spaces were used as aisles or walkways to access the boxes and that they were not the required 24 inch width.

The Board notes that an aisle or walkway as delineated in section 3272(b) is different than a corridor delineated in the Building Code (Title 24). The 24 inches delineated in section 3272(b) is room enough for one average sized man to traverse through to get to a safe means of egress but is not in and of itself room enough to allow safe egress for a group of workers out of a building during an emergency. Corridors, which are required to be 44 inches in the Building Code, are normally architecturally designed to be the primary means of egress from buildings. The Board also notes that doors are commonly wider than 24 inches which the Board believes gives further credence to the conclusion that the 24 inch minimum requirement is for spaces which may be used as aisles or walkways to access machinery equipment, parts and stock as enunciated in section 3272(b) and is not the required width for a safe means of egress.

Employer contends in its petition, as it did at the hearing that the abatement requirement is unreasonable. The Board has reviewed the ALJ's decision as to the abatement issue and does not find any flaws in her analysis. The ALJ's decision is adopted herein as follows:

Employer claimed that widening the aisles to 24 inches would create a greater hazard to its employees. Acceptance of this contention would invade the authority granted exclusively to the Occupational Safety and Health Standards Board. (*Gates & Sons,*

Inc., Cal/OSHA App. 79-1365, Decision After Reconsideration (Dec. 15, 1980).) The express requirements of the safety order do not permit a variance or discretion in interpretation. (*Id.*)

Employer further appealed the abatement requirements and the time allowed to abate on the grounds that abatement is not feasible. Employer argues that with 24 inch aisles, the rows of boxes would not be aligned with the associated flow rack section giving each Picker too much area to cover while the conveyor went by at 75 feet per minute. Employer's argument is unpersuasive.

Although the Division suggested one means of abatement (widening the aisles to 24 inches), it did not mandate any specific means of abatement. The Division has only required compliance with the minimum requirements of the safety order. Employer may choose the least burdensome. (*The Daily Californian/Calgraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

The building and floor structure suggest flexibility in the way Employer's operations can be set up. The floor is open and unobstructed except for some structural pillars as evident from Guthrie's testimony and Exhibits B, C, D, E, F, G, H, I, and K. The metal racks are freestanding. Employer may not be able to operate at its present rate of 75 feet per minute if all it does is widen the aisles. However, Employer gave no reason why it could not slow down the conveyor, add more employees to the line, make the rows of the boxes narrower and longer, reconfigure the metal racks, or take other measures. Therefore, the abatement requirements and the time allowed to abate are found reasonable.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ's decision and the assessment of a \$300 civil penalty.

CANDICE A. TRAEGER, Chairwoman
MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: November 17, 2004